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No. 83-____

In The
Supreme Court of the United States
October Term, 1983

DENNIS J. LEWIS,

Petitioner,

v.

BROWN & ROOT, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals has the power to decide in an employee's appeal from a judgment of the United States District Court, in a civil rights case, that the employee's appeal was frivolous, unreasonable and without foundation and further that his appeal was an unreasonable and vexatious multiplication of proceedings and that the employer was entitled to an award of attorney's fees on appeal and double costs where the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated and remanded in part the judgment of the United States District Court.

2. Whether the Chief Justice of the United States Supreme Court should make public statements regarding frivolous law suits when a Petition for Rehearing and a Suggestion for Rehearing En Banc are pending before the United States Court of Appeals for the Fifth Circuit on issues regarding claimed frivolous law suits.

3. Whether the district court has the power to award attorney fees against plaintiff and against plaintiff's attorney, in an employment discrimination action, where the findings of fact of the district court fails to include a finding that plaintiff's action was frivolous, unreasonable and without merit, and a finding that the action of plaintiff's attorney multiplied the proceedings in an unreasonably and vexatiously manner.

4. Whether the district court has the power to award attorney fees against plaintiff and against plaintiff's attorney more than ten days after entry of judgment and after the plaintiff files a notice of appeal.

5. Whether the district court should have dismissed plaintiff's action, upon the merits, before plaintiff rested and completed his case.

6. Whether the district court has the power to dismiss an employment discrimination action, upon the merits, where plaintiff has established a prima facie case, and the employer failed to produce a legitimate non-discriminatory reason for the action of the employer.

7. Whether the district judge has the power to dismiss an employment discrimination action, for want of prosecution, where no reference to a dismissal for want of prosecution is made in the oral decision of the district judge or in the final judgment where plaintiff has established a prima facie case.

8. Whether the district judge should disqualify himself where after an exchange of cases, and after a substitution of his former law firm as attorney for a party in the action in his court, shortly before trial, and his actions during and after trial indicate a lack of an appearance of impartiality.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Dennis J. Lewis, Petitioner

Brown & Root, Inc., Respondent.

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A writ of certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals Appendix A is reported at 711 F.2d 1287, 5th Cir. 1983. The opinion of the court of appeals Appendix I, is reported at — F.2d —, 5th Cir. 1984.

There is no formal opinion of the District Court. Excerpts of the transcript in that Court, including the judge's statement in dismissing the case are reproduced in Appendix F to this Petition.

The order of the District Court granting motion for an award of attorney's fees is reproduced as Appendix D. The order and opinion of the court setting the amount of the attorney's fees is reproduced as Appendix E.

JURISDICTION

The judgment of the Court of Appeals (App. G, *infra*, A-41-A-42) was entered on August 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C.A. 1981 provides:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal bene-

fit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

42 U.S.C.A. 2000(e) 2 provides:

§ *2000e-2. Unlawful employment practices*

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 59(e) Federal Rules of Civil Procedure, 28 U.S.C.A. provides:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

28 U.S.C.A. 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 52(b) Federal Rules of Civil Procedure Provides:

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

28 U.S.C.A. 1927 provides:

§ 1927. Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. As amended Sept. 12, 1980. Pub.L. 96—349 § 3, 94 Stat. 1156.

28 U.S.C.A. 455

28 U.S.C.A. 455. Interest of justice or judge.

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected

with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. June 25, 1948, c. 646, 62 Stat. 908.

STATEMENT OF THE CASE

Petitioner, age 29, filed a charge of discrimination against respondent charging he was discriminated against in the delay in his rehiring by respondent. Petitioner was employed as a pipefitter by respondent, a large Texas construction corporation. Petitioner is black and had a non-minority employee of respondent, Randall Karm, working with him as his pipefitter helper. Karm was under the supervision of petitioner in his work as petitioner's helper. On January 12, 1980 Petitioner and Karm were fired for being engaged in horseplay by Tommy Spurgeon, a supervisor over petitioner and Karm. Although petitioner denies he was engaged in horseplay, at no time has he made a charge or claim that his discharge was discriminatory. Petitioner and Karm were treated alike since they were both fired. Tommy Spurgeon and Walter L. Taylor, supervisors of petitioner and Karm, promised them they would be rehired in thirty days. Karm was rehired on February 13, 1980 and petitioner was not rehired until November 4, 1980. Petitioner applied to be rehired on February 12, 1980 but was rejected by Carney, respondent's agent and employee in charge of its personnel office. All of the individuals involved in this action are non-minority except petitioner. Petitioner's charge was based on the delay in his rehiring. Petitioner claimed

he lost approximately $10,000.00 by respondent rehiring Karm in February, 1980 and waiting until November, 1980 to rehire petitioner. The EEOC issued petitioner a Notice of Right To Sue dated April 23, 1980.

Walter L. Taylor, one of petitioner's supervisors, gave petitioner a written statement petitioner was to be rehired on February 12, 1980. Petitioner had been fired and rehired several times before and several times after the incident of January 12, 1980. The ugly picture of discrimination emerges, according to petitioner, when it came time for him to be rehired on February 12, 1980. Respondent's promise to the non-minority was honored and respondent's promise to petitioner was not honored. Petitioner claimed he was better qualified than Karm since he was the pipefitter and Karm was his pipefitter's helper. The respondent had a policy of hiring, firing, rehiring, and laying off petitioner and others. The question is not that respondent rehired petitioner in November, 1980, but the question is the failure to rehire petitioner on or about February 12, 1980. Petitioner filed his original complaint on August 5, 1980, in the United States District Court for the Southern District of Texas. Trial of this action was started by the district court around 10:15 a.m. on April 21, 1982. The Court took its noon recess at 12:45 p.m. until 1:30 p.m. according to the Court Reporter's original certified transcript. (Appendix F, Tr. 72). The noon recess took place around 12:20 p.m. and the petitioner and his counsel were present in the courtroom prior to 1:00 p.m. and at about 1:30 p.m. the clerk of the district judge came into the courtroom and informed plaintiff and his counsel the case had been dismissed. Prior to leaving the courtroom the court personnel of the district court were asked

to inform the district judge the plaintiff and his counsel may be a few minutes late getting back from the fifteen minutes noon recess. At some time on April 21, 1982 the district court orally dismissed the petitioner's action on the merits. (Appendix F, Tr. 72-73). Petitioner and attorney were not present when the case was dismissed. No mention was made by the district court that the action was dismissed for want of prosecution. The final judgment of the district court was entered on April 23, 1982. The court dismissed the petitioner's action upon the merits. No mention is made by the district court in its final judgment that the action was dismissed for want of prosecution. The final judgment was not amended.

The findings of fact and conclusions of law and final judgment were entered by the district court on April 23, 1982. No motion was made to amend the findings of the judgment at any time. Petitioner and his attorney were not present at the time the district Judge dismissed this action. On May 7, 1982 respondent filed a motion for attorney's fees in the amount of $6,000.00. On June 14, 1982 the district court granted defendant's motion for an award of attorney's fees but withheld assessing the amount of attorney's fees. On August 18, 1982 the district court made an order setting the amount of attorney's fees as $2,500.00 and made certain findings of fact. The entire amount of the attorney's fees were awarded against plaintiff's attorney as well as against the plaintiff. No motion was made for an extension of time to award costs or attorney's fees. At no time did the district court state it was retaining jurisdiction for any purpose. Petitioner, filed his notice of appeal on May 19, 1982. On August 18, 1982 the district court made its finding that petitioner's action was

frivolous, unreasonable and without foundation and that the action of petitioner's attorney multiplied the proceedings in an unreasonably and vexatiously manner and granted respondent an award of attorney's fees. No evidentiary hearing was held on the motion for an award of attorney's fees. In November, 1982, the district court granted a motion of respondent to correct the record wherein the court reporter previously had certified the record that the noon recess was from 12:45 to 1:30. Petitioner and his attorney were not present until around 12:50 p.m. and have no knowledge of what transpired at the time the district court dismissed this action. On August 28, 1983, Respondent submitted a bill of cost and a motion to the court of appeals for attorney's fees and double costs.

On November 12, 1983 petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court. An order was made by the United States Supreme Court on January 16, 1984, denying the Petition for Writ of Certiorari. On January 9, 1984 in an Opinion Sua Sponte the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated and remanded in part the judgment of the United States District Court. On February 17, 1984, the United States Court of Appeals for the Fifth Circuit made an order denying Petitioner's Petition for a Rehearing and Suggestion for Rehearing En Banc.

REASONS FOR GRANTING WRIT

Judge Tate of the United States Court of Appeals for the Fifth Circuit said the following regarding the de-

cision awarding double costs and attorney fees on the appeal:

> "... I of course concur, insofar as the majority now correctly realizes that it cannot assess a civil rights claimant's attorneys personally with attorney's fees for bringing the claimant's suit and affording him his day in court. However, I dissent from the allowance of attorney's fees against both the claimant and his attorney.
>
> I further find the majority's allowance of double cost for a frivolous appeal, Fed.R.App.P. 38, to be unconscionably wrong. Aside from the circumstance that one of the judges dissented from the affirmance—a dissent that by implication the majority finds to be 'frivolous, unreasonable and without foundation'—, the appeal presented an instance almost unique in our case-law where the civil rights claimant's attorney was assessed personally with the defendant's entire attorney's fees, an error that the majority recognizes by remanding for further findings on that issue. Thus, although the majority recognizes that the appellant was entitled to some relief attainable only by an appeal, the majority characterizes that appeal as frivolous and assesses double costs!"

Based strictly upon the district court's findings of fact and stipulation of the attorney for the employer all of the necessary elements were established by petitioner to prove a prima facie case. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 668. If this case is still valid the principles should be applied in an even handed manner to petitioner and all civil rights litigants. There is no reason to discriminate against petitioner in applying the law stated in *McDonnell Douglas Corp. v. Green* and cases following.

In addition to denying petitioner the benefits of having established a prima facie case the petitioner has been placed in a unique position and denied the following fundamental rights:

1. There was pre-judgment of the case, when the district court in effect said under no set of circumstances will the petitioner be able to prove his case and dismissed on the merits before petitioner rested;

2. The district court made an award of attorney fees against petitioner without making a finding in its findings of fact and conclusions of law, that the petitioner's action was frivolous, unreasonable and without foundation.

3. The district court made an award of attorney fees against petitioner's attorney without making a finding, in its findings of fact and conclusions of law, that the actions of petitioner's attorney resulted in an unreasonable and vexatious multiplication of the proceedings.

4. The district court attempted to amend its finding more than 10 days after entry of judgment contrary to Rule 52 (b) of the Federal Rules of Civil Procedure.

5. The district court made an award of the amount of attorney fees after petitioner had filed a notice of appeal and it had lost jurisdiction.

Judge Tate said the petitioner had been the victim of blatant discrimination by the employer. The petitioner has also been the victim of blatant discrimination in not

getting the benefit of well settled fundamental principles of federal law.

In January, 1984 Petitioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc with the United States Court of Appeals for the Fifth Circuit. One of the issue was the question of a frivolous law suit. On February 12, 1984 at Las Vegas, Nevada the Chief Justice of the United States Supreme Court made a public statement widely distributed and disseminated throughout the United States commenting on frivolous law suits and one of the issues involved and pending in the United States Court of Appeals. A few days after the Chief Justice's comments on February 12, 1984 the United States Court of Appeals on February 17, 1984 denied the Petitioner's Petition and Suggestion for Rehearing En Banc. The comments could only have had an adverse effect upon the panel and the court considering the petition and the suggestion.

Prior to assessing attorney fees against anyone for a frivolous law suit the suit in fact should be frivolous. A suit with merit is not frivolous. Judge Tate of the United States Court of Appeals for the Fifth Circuit said petitioner established a prima facie case. According to the principles of *McDonnell Douglas v. Green* the petitioner's suit was not frivolous. Petitioner's attorney in no material way multiplied the proceedings in the district court.

This entire action is the result of the trifling, petty, and unnecessary discrimination of the employer that had a serious result on the petitioner. He lost $10,000.00. This $10,000.00 loss may seem petty to some, however the Civil Rights Act of 1964 does not set out a jurisdictional amount.

In an article in the Milwaukee Journal dated March 18, 1984 with a title of "Our legal system isn't abused by the people" by Adrian P. Schoone, President of the State Bar of Wisconsin, the following comments were made:

> "THE JOURNAL'S REPUTATION for balanced perspective was jeopardized by its Feb. 19 editorial 'What's wrong with lawyers?' By describing Chief Justice Warren Burger 'as a perceptive and constructive critic of the legal system,' it gave lip service to inaccurate information the chief justice and others are disseminating.
>
> The chief justice talks of a litigation glut and frivolous claims. But a detailed study at our own University of Wisconsin has graphically demonstrated that our American legal system is hardly overrun by litigious people.
>
> The findings of the study are numerous but here are some highlights:
>
> Only 10% of people with legal disputes end up in court.
>
> When suits are brought, they are started because of monetary disputes, and usually involve amounts less than $10,000.
>
> Most of the lawsuits are settled short of actual trial, within 18 months after institution of suit.
>
> In almost half of all lawsuits started, the lawyer fees were less than $1,000.
>
> For reasons that bear intensive investigation by the fourth estate, the United States Department of Justice, which financed most of this study with a $1.8 million contract, has kept the findings a deep secret. . . ."

In the instant case the legal system is not being abused by the petitioner but the petitioner is being abused by the legal system.

This case presents important questions regarding the personal liability of attorneys and parties in civil rights litigation. It may have serious consequences with respect to enforcement of civil rights legislation. The district court made an award of attorney's fees against plaintiff's attorney for the entire amount of the awarded attorney's fees. There was no finding in the findings of fact and conclusions of law that plaintiff's attorney unreasonably and vexatiously multiplied the proceedings. There was no finding in the findings of fact and conclusions of law that the action was frivolous, unreasonable and without foundation.

The court of appeals ruling does not follow *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 668 with regard to presumptions. The ruling allows the harsh action of a dismissal on the merits of a civil rights action without allowing plaintiff to rest or complete his case. Furthermore, the court of appeals held that a dismissal for want of prosecution was warranted. There was no mention of a dismissal for a want of prosecution in the oral decision of the district court or in the entered final judgment.

In an indication of the importance of this case, Judge Tate said the following in his dissenting opinion:

> "In summary the *Christiansburg* reasons that prevent an award of his opponent's attorney's fees against a civil rights claimant, lest it merely *inhibit* his access to the courts, even more urgently apply against imposing personal liability for such fees upon his unsuccessful attorney who had assured his access to the courts, lest such a principle totally *deprive* the civil rights claimant of access to the courts."
>
> (Emphasis courts)

Furthermore Judge Tate said:

> "Moreover to assess attorney's fees against the civil rights claimant is egregiously wrong under present facts, where the court-ordered truncation of his full case may have deprived him from presenting on redirect examination an explanation that the supervisor's 'personnel' animus may have had a colorable racial motivation."

The court of appeals concluded that delay in rehiring did not stem from racial bias because a personal grievance was a legitimate non-discriminatory reason for inaction of employer. The employee in charge of the personnel office who told petitioner he would not be rehired and caused the delay in his rehiring did not have a personal grievance against petitioner. The employee in the office who may have had a personal grievance against petitioner was not the agent of employer responsible for the action that resulted in the employment discrimination claim. A personal grievance as a legitimate non-discriminatory reason for the action of an employer would have far ranging effect especially where you are imputing the personal grievance of one employee to the action of another employee. The court of appeals ruling ignores that the agent of the employer in charge of the personnel office was the one responsible for the action of the employer.

1. A divided court of appeals affirmed the district court's decision. Judge Tate dissented, in part, on the grounds that the award of attorney's fees against the petitioner violated the principles laid down by *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 648 (1978). It stated as follows:

> "In sum a district court may in its discretion award attorney's fees to a prevailing defendant in a Title

VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation even though not brought in bad faith."

In its findings of fact and conclusions of law entered on April 23, 1982 the district court made no finding that the plaintiff's action was frivolous, unreasonable or without foundation. As a result of this omission the district court could not make an award of attorney's fees since essential elements were not found in its findings of fact.

Judge Tate concluded:

"From the previous description of the litigation it appears plain to me that plaintiff Lewis's suit was not 'frivolous, unreasonable or groundless' in the *Christiansburg* sense".

The district court did not find in its findings of fact and conclusions of law that the action of the plaintiff's attorney multiplied in an unreasonably and vexatiously manner the proceedings. Without such a finding the award against plaintiff's attorney could not be made. 28 U.S.C. 1927 is strictly construed. *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107, 97 S. Ct. 1139, 51 L.Ed. 559 (1977).

Regarding the strict construction of 28 U.S.C. 1927 Judge Tate in his dissent said:

"The Court also affirmed, 447 U.S. at 767, 100 S.Ct. at 2465, the earlier ruling of this court, 599 F.2d 1378, that the civil rights plaintiffs' attorneys were personally liable under § 1927. There, inter alia, we had pointed out that '§ 1927 should be strictly construed because it is penal in nature', 599 F.2d at 1382, and we had held that '§ 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the pro-

ceedings, and not for the total costs of the litigation.' 599 F.2d at 1383 (emphasis the Court's).

In my view, the majority offends these principles in at least two respects. First, affording a strict construction to the statute in the light of its purposes as reflected by its legislative history, a claimant's attorney should not be penalized by personal liability for his opponent's attorney's fees simply because the attorney assured the claimant his day in court; and especially not when the skeletal facts presented a prima case of racial discrimination in a civil rights complaint. Second, if the attorney is to be penalized for unreasonable and vexatious actions in the conduct of the suit, his personal liability for the opponent's attorney's fees should be limited only to the *excess* costs so occasioned; he should not be liable for the opponent's total attorney's fees incurred in defending the claim on the merits."

2. The motion for an award of attorney's fees against plaintiff was made fourteen days after entry of judgment. The final judgment was entered on April 23, 1982. And the motion for an award of attorney's fees is a motion to alter or amend a judgment and must be brought within ten days of the entry of judgment. *El-Amin v. Williams*, D.C. Va. 1981, 92 F.R.D. 454; *Glass v. Pfeffer*, C.A. Ill. 1981, 664 F.2d 252; *Fase v. Seafarers Welfare and Pension Plan*, D.C. N.Y. 1978, 79 F.R.D. 363. A motion to amend or alter a judgment or make additional findings must be served within ten days of the entry of judgment. *Turner v. Ohman House Corp.*, C.A. Tenn. 1967, 376 F.2d 347; *Munich v. U.S.*, C.A. Cal. 1964, 350 F.2d 774; *Fine v. Paramount Pictures*, C.A. Ill. 1950, 181 F.2d 300; *Marks v. Philadelphia Wholesale Drug Co.*, D.C. Pa. 1954, 125 F. Supp. 369. Federal Rules of Civil Procedure Rule 59(e), 52(b), 28 U.S.C.A. The district court's findings of fact

and conclusions of law and final judgment were entered on April 23,1982. In the district court's order dated August 18, 1982, setting the amount of the attorney's fees, for the first time there is a finding that the action was frivolous, unreasonable and without foundation.

The district court did not retain jurisdiction to award attorney's fees after it dismissed this action. *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1381. Notice of appeal was filed on May 19, 1982 and the district court granted defendant's motion for an award of attorney's fees on June 14, 1982 and set the amount of the attorney's fees on August 18, 1982. After the notice of appeal was filed the district court lost jurisdiction. The filing of a notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals. *United States v. Hitchmon* (C.A. 5th 1979), 58 F.2d 1357; *State of New York v. Nuclear Regulatory Commission* (C.A. 2d 1979), 550 F.2d 745, 22 F.R.Serv. 2d 1476; 9 *Moore's Federal Procedure* 203.11, Federal Rules App. Proc. Rule 3, 28 U.S.C.A.

3. The petitioner was not allowed his day in court. Judge Tate stated in his dissent:

> "The attorney had assured Lewis access to the courts, to secure judicial redress for him for what on its face seemed *blatant* racial discrimination in rehiring the white assistant, but refusing to rehire the black plaintiff, where both had been discharged for simultaneous and joint misconduct." (Emphasis added.)

If petitioner had been allowed to complete his case the petitioner would have shown more clearly it was Carney, not Petty, who was the agent of respondent who refused to rehire petitioner on February 12, 1980. Further-

more, it would have been shown that other non-minority employees under the same circumstances, besides Karm, were rehired as expressly promised by respondent.

4. The dismissal of this action upon the merits was not warranted since petitioner established and proved a prima facie case. In accordance with the objective guideline set out in *McDonnell Douglas Corp. v. Green, supra,* petitioner established a prima facie case.

The district court found that petitioner was black; applied to be rehired; was rejected and that the position was filled by the employer. It is undisputed the position was filled by a non-minority and the attorneys for the respondent stipulated petitioner was qualified. (Appendix F, Tr. 6, 7). Petitioner established a prima facie case. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 67 L.Ed. 207, 101 S.Ct. 1098. By establishing a prima facie case the petitioner created a presumption that the respondent was unlawfully discriminating against petitioner. Without a non-discriminatory reason for the refusal to rehire petitioner the district court should have entered judgment for petitioner if it was going to decide the case on the merits. *Texas Department of Community Affairs v. Burdine, supra; McDonnell Douglas Corp. v. Green, supra.*

In addition to supplying a legitimate non-discriminatory reason why it did not rehire petitioner at the same time it did Karm, respondent, it seems, by making an express promise to rehire petitioner on a certain date should also produce a legitimate non-discriminatory reason why its expressed promise was not kept with its non-minority employee.

The district court and the majority in the court of appeals held there was no discrimination in rehiring because the petitioner was rehired. Petitioner makes no contest or claim that he was not rehired at all. The petitioner's complaint is that his helper was given preference over him by being rehired when respondent promised he would rehire him. The petitioner, a black person, was not rehired as promised. The difference in the time element of the rehiring constitutes the disparate treatment.

The court of appeals decided that the delay in rehiring petitioner was not the result of racial bias because Petty, one of respondent's agents and employees, had a personal grievance against petitioner. Carney, was the agent and employee of the respondent who refused to rehire petitioner. Carney's motive was not produced at the trial by the respondent. Any personal grievance Petty may have or may not have against petitioner does not alter or change respondent's obligation to not discriminate in its employment practices.

The person who told petitioner there was no job for him was Carney. (Appendix F, Tr. 30, 59, 60, 61). What went on between Petty and Carney is speculation since no one testified on behalf of respondent at the trial. Carney's motives are unknown. Carney told the respondent that Jack Laswell, the project manager said not to rehire petitioner. Jack Laswell's motives are unknown. It was Carney who should supply a legitimate non-discriminatory reason for his action. Imputing Petty's personal grievance should not supply a sufficient non-discriminatory reason because the respondent rehired the petitioner in November, 1980. Petty's personal grievance in February did not prevent respondent from rehiring petitioner in

November, 1980. This strongly indicates a personal grievance was not a factor in failing to rehire petitioner in February, 1980. Petitioner's employment record was not a factor in failing to rehire him in February, 1980. Petitioner was hired and fired several times before and several times after the incident in question by respondent. The district court stated in its findings that "Apparently Taylor had either changed his mind or more likely merely forgotten to ask the personnel office to rehire Plaintiff." There is no evidence in the record to support this statement. Taylor did not testify at the trial.

5. The majority in the court of appeals held that dismissal of the action for want of prosecution was warranted. Judge Tate in his dissenting opinion disagreed with this conclusion. Dismissal for want of prosecution is a harsh sanction, especially in an action such as this where petitioner and his attorney had no intention of being late returning to the trial of this action. A fifteen minute noon recess is short. The trial of this action would probably not have taken longer than another hour to complete. At the time it was dismissed by the district court the trial had lasted two hours and five minutes. A trial of three hours does not seem a long time even if it is not a serious matter as the majority in the court of appeals implied. A loss of $10,000.00 in earnings is a serious matter to petitioner. Dismissal for want of prosecution should be used sparingly. *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

The appeal was from the final judgment of the district court. The final judgment and the oral decision dismiss-

ing this case are silent with respect to any mention on dismissal for want of prosecution. The final judgment dismissed the action of the merits. Dismissal for want of prosecution was not a part of the final judgment.

The effect of a timely filed appeal is to immediately transfer jurisdiction to the court of appeals, 9 *Moore Federal Practice* §203.11 at 734. *United States v. Hitchmon*, (C.A. 5th, 1979) 587 F.2d 1357.

6. A district judge should not only be impartial but also give the appearance of impartiality. *Texaco, Inc. v. Chandler*, CA Okl. 1965, 354 F.2d 655, *certiorari denied*, 80 S.Ct. 1066, 383 U.S. 936, 15 L.Ed.2d 853, 28 U.S.C. 455. The district judge exchanged cases CAH 80-2432, H-81-1171 and H-81-1177 for this case. On April 8, 1982, the district judge's former law firm was substituted as attorneys for respondent. The district judge had been associated with the substituted attorneys.

The harsh action of dismissing this case upon the merits because of unintentional absence of petitioner and his attorney, for being a few minutes late, returning from a fifteen minute noon recess; the failure to give consideration to a request communicated to the district judge's court personnel for a few minutes extension of the fifteen minute noon recess; dismissing this case without giving petitioner an opportunity to rest; the awarding of attorney's fees against petitioner without making a finding of fact that the action was frivolous, unreasonable and without foundation; granting an award of attorney's fees against the attorney for petitioner without making a finding in district judge's finding of fact that the actions of the attorney multiplied unreasonably and vexatiously the pro-

ceeding; making the award of attorney's fees after notice of appeal to the Court of Appeals; making findings more than ten days after entry of judgment; making another set of finding of fact about three months after entry of the original findings of fact and conclusions of law and final judgment; making a finding in the district judge's order dated August 18, 1972, that petitioner was not qualified and the attorneys for respondent had stipulated petitioner was qualified; making the award of attorney's fees against plaintiff's attorney for the entire amount of the attorney's fees; making the award of attorney's fees without an evidentiary hearing; all of the above factors point to a lack of the appearance of impartiality of the district judge in violation of 28 U.S.C.A. 455.

All of the above statements apply to petitioner's claim under Title VII of the Civil Rights Act and 42 U.S.C. 1981.

CONCLUSION

For the reasons set forth above, the petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Court of Appeals for the Fifth Circuit and U.S. District Court be reversed.

Respectfully submitted,

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713-526-5505

Attorney of Record for Petitioner

APPENDICES A-H

Petitioner has filed a motion that Appendix A-H of Petition for Writ of Certiorari and Case 83-799 be Incorporated herein by reference as a part of this present Petition for Writ of Certiorari.

APPENDIX I

DENNIS J. LEWIS,

Plaintiff-Appellant,

v.

BROWN & ROOT, INC.,

Defendant-Appellee.

No. 82-2217.

United States Court of Appeals,
Fifth Circuit.

Jan. 9, 1984.

Employee brought civil rights action against employer. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., entered an order dismissing action, and employee appealed. The Court of Appeals, 711 F.2d 1287, affirmed. On sua sponte reconsideration, the Court of Appeals held that: (1) matter would be remanded for reconsideration of amount of attorney fee award entered against employee's counsel, and (2) employer was entitled to an award of attorney fees on appeal and double costs.

Affirmed in part, vacated and remanded in part.

Tate, Circuit Judge, dissented and filed opinion.

1. Federal Courts 947

Where order in civil rights proceeding awarding attorney fees entered against plaintiff's counsel was subject to construction that it was only on proceeding to ac-

tual trial that plaintiff's counsel acted unreasonably and vexatiously, which, if so, would render award of fees in entire proceeding inappropriate matter would be remanded to enable trial court to reconsider award, either reducing it proportionately or entering findings that support it.

2. Federal Civil Procedure 2743, 2747

Where appeal by employee bringing civil rights action against employer from unfavorable district court judgment was in great part frivolous, unreasonable and without foundation and, in view of record, largely constituted an unreasonable and vexatious multiplication of proceedings in case, employer was entitled to award of attorney fees on appeal and double costs.

Appeal from the United States District Court for the Southern District of Texas.

OPINION SUA SPONTE

Before GEE, GARZA and TATE, Circuit Judges.

PER CURIAM:

Despite the absence of a petition for rehearing addressed to our earlier opinion reported at 711 F.2d 1287, we have withheld our mandate because of a concern that we have developed, sua sponte, regarding a portion of the award of attorney's fees against plaintiff's counsel. We now VACATE that award and remand to the trial court for further proceedings as to it and other matters.

[1] Our concern regarding the award against counsel arises from the circumstance that the district court

awarded the total amount of defendant's attorney's fees against plaintiff's counsel but that its order doing so recites merely that plaintiff's counsel "should have advised Plaintiff not to *proceed to trial. . . .*" It then observes that "[*i*]*n following this course,* attorney for Plaintiff unreasonably and vexatiously multiplied these proceedings. 28 U.S.C. § 1927 (Supp. 1982)." (emphasis added). The order is thus, despite omitted intervening terminology, subject to the construction that it was only on proceeding to actual trial that counsel acted unreasonably and vexatiously. If so, an award against him of fees in the entire proceeding would not be appropriate. On remand, the trial court should reconsider this award, either reducing it proportionately or entering findings that support it.

[2] Defendant has now moved for an award of attorney's fees on appeal and double costs. As we conclude that the appeal was in part frivolous, unreasonable and without foundation and that, in view of the record, it largely constituted an unreasonable and vexatious multiplication of the proceedings in the case, we GRANT the motion and REMAND for a determination by the trial court and award of a reasonable attorney's fee on appeal. Double costs on appeal are GRANTED defendant. Both fee and costs shall, however, be reduced by one-third, and the remaining two-thirds awarded.*

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* We so provide in view of our granting of *some* relief on the appeal, even though it was relief for which plaintiff's counsel made little or no contention, based on a record defect discovered by us—not by counsel.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

TATE, Circuit Judge, dissenting:

For the reasons earlier noted, I respectfully dissent.

I of course concur, insofar as the majority now correctly realizes that it cannot assess a civil rights claimant's attorneys personally with attorney's fees for bringing the claimant's suit and affording him his day in court. However, I dissent from the allowance of attorney's fees against both the claimant and his attorney.

I further find the majority's allowance of double cost for a frivolous appeal, Fed.R.App.P. 38, to be unconscionably wrong. Aside from the circumstance that one of the judges dissented from the affirmance—a dissent that by implication the majority finds to be "frivolous, unreasonable and without foundation"—, the appeal presented an instance almost unique in our case-law where the civil rights claimant's attorney was assessed personally with the defendant's entire attorney's fees, an error that the majority recognizes by remanding for further findings on that issue. Thus, although the majority recognizes that the appellant was entitled to some relief attainable only by an appeal, the majority characterizes that appeal as frivolous and assesses double costs!

APPENDIX J

United States Court of Appeals
for the Fifth Circuit

No. 82-2217

Dennis J. Lewis,

Plaintiff-Appellant,

versus

Brown & Root, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before GEE, GARZA and TATE, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinions of this Court.

IT IS FURTHER ORDERED that plaintiff-appellant to pay to defendant-appellee, two-thirds of the double cost on appeal.

JANUARY 9, 1984

Issued as Mandate: Feb. 27, 1984

REISSUED AS MANDATE: